

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

LUCAS CALIXTO, *et al.*,

Plaintiffs,

vs.

DEPARTMENT OF THE ARMY, *et al.*,

Defendants.

Civil Action No. 18-1551 (ESH)

**DEFENDANTS' STATUS REPORT**

In accordance with the Court's Order entered on August 13, 2018 (ECF No. 23), Defendants respectfully submit this bi-weekly status report.

1. The Court ordered Defendants to file bi-weekly status reports with any updates regarding the Army's policy on administrative separation procedures applicable to Delayed Entry Program ("DEP") and Delayed Training Program ("DTP") members, as well as any intention to separate any DEP or DTP member in accordance with this policy. ECF No. 23.

2. On October 31, 2018, in accordance with the Court's Order entered on October 17, 2018, Defendants filed a copy of the Army's new policy memorandum, dated October 26, 2018, on administrative separation procedures applicable to members of the DEP and DTP who received or will receive an unfavorable Military Service Suitability Determination ("MSSD"). (ECF No. 50-1).

3. As of the date of this report, no administrative separations have been initiated in accordance with the October 26, 2018 policy memorandum.

4. In December, the Army began notifying former members of the DEP and DTP who were discharged or separated before July 20, 2018 due to an unfavorable MSSD resulting from a

documented Counterintelligence concern that they had the option to be reinstated for the purpose of receiving the administrative due process described in paragraph 5 of the October 26, 2018 policy memorandum.

5. On January 3, 2019, the Army began notifying individuals who received unfavorable Military Service Suitability Recommendations (“MSSRs”) that they have the opportunity to submit matters in accordance with paragraph 3 of the October 26, 2018 policy memorandum. Additional MAVNIs will be notified over the next several weeks.

6. Defendants respectfully apprise the Court that, in the course of preparing their response to the Second Amended Class Action Complaint (ECF No. 61), Defendants have identified the following jurisdictional defect: lack of a waiver of sovereign immunity. Therefore, Defendants will file a motion to dismiss under Rule 12(b)(1) by noon this Friday, January 25, 2019; which is in accordance with the Court’s minute order entered on December 4, 2018 regarding the deadline for Defendants to file their response.

7. Defendants’ motion will argue that the Second Amended Class Action Complaint does not properly invoke the limited waiver of sovereign immunity provided by the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, because it does not present the Court with a discrete and final agency action that can be reviewed on the basis of an administrative record. This argument is based on the Supreme Court’s decision in *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004), and its progeny.

8. Defendants will further argue in the motion that the above-noted jurisdictional defect, once ruled on by the Court, will render Plaintiffs’ motion for class certification moot. And in any event, because subject matter jurisdiction is a threshold issue that must be resolved prior to addressing the merits of Plaintiffs’ motion for class certification, *see, e.g., In re Navy*

*Chaplaincy*, 306 F.R.D. 33, 44 (D.D.C. 2014), Defendants will respectfully request deferral of its substantive opposition to Plaintiffs' motion (if any is needed) until after the Court decides the threshold issue of subject matter jurisdiction.

Dated: January 22, 2019

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that on this 22nd day of January 2019, I served the foregoing Defendants' Status Report upon counsel for Plaintiffs by filing said document using the Court's Electronic Case Filing System.

Dated: January 22, 2019

/s/ Roberto C. Martens, Jr.  
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